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82-127

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

TISH JENNINGS,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

ROBERT S. BLATT
Attorney at Law
P.O. Box 1825
Fort Smith, Arkansas 72902
(501) 785-0123

Attorney for Petitioner

QUESTION PRESENTED

1. DID THE DELAY OF SIXTEEN MONTHS FROM ARREST TO THE TRIAL DATE VIOLATE PETITIONER'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL?

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OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 276 Ark. 217 (May 24, 1982) (Advance sheets). The opinion is set forth in Appendix "A" to this Petition.

JURISDICTION

The final order of the Arkansas Supreme Court was entered May 24, 1982 denying petitioner's petition for Writ of Prohibition to the Sebastian County Circuit Court to prohibit trial of her case.

Notice of filing for Writ of Certiorari to Review was filed in the Arkansas Supreme Court on June 8, 1982.

The jurisdiction of the United States Supreme Court to review this decision by Petition for Writ of Certiorari is conferred by 28 U.S.C. Section 1257.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

The United States Constitutional Provision involved is Amendment 6 and can be found in U.S.C.A., Constitution, Amendment 6, page 223.

Amendment 6 provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * *.

STATEMENT

On October 3, 1980, the petitioner, Tish Jennings along with a co-defendant, Ron Peters, was charged in Sebastian County Circuit Court with the offense of Delivery of Methaqualone, a Class "B" Felony, in violation of *Ark. Stat. Ann.* §82-2617. The State alleged that the offense occurred on June 3, 1980.

The time frame in this case is as follows: The offense was committed on June 3, 1980. On August 26, 1980, an Information was filed in Fort Smith Municipal Court charging Jennings and Peters with this offense and a warrant was issued on that date by the Municipal Court. On August 28, 1980, the defendant was arrested and made bail bond in the amount of $4,000.00. On August 29, 1980 the petitioner was arraigned in Municipal Court and arraignment was continued until September 5, then 12, 1980. On September 30, 1980, a preliminary hearing was held and the petitioner was bound over to Circuit Court for trial. Trial was set for December 17, 1981.

On December 7, 1981, the petitioner filed a Motion to Dismiss her case because of a denial of a speedy trial and

on December 10, 1981, amended the motion. On December 10, 1981, a hearing was held by the trial court, evidence and testimony was presented, arguments of counsel were made and the trial court orally made findings and denied the Motion to Dismiss.

On January 19, 1982, a written order was filed and entered in accordance with the oral findings delivered at the hearing. The petitioner petitioned the Arkansas Supreme Court for a Writ of Prohibition to prohibit trial of this case on the merits in accordance with Rule 28.1(d) of the Arkansas Rules of Criminal Procedure.

On May 24, 1982, the Arkansas Supreme Court delivered its opinion and decision denying the petition for a Writ of Prohibition. The Court held that petitioner's speedy trial rights had not been violated by a 16 month delay in trial from her arrest.

Petitioner now petitions this court for a Writ of Certiorari to review the final order of the Arkansas Supreme Court in denying the petition for a Writ of Prohibition.

ARGUMENT

Petitioner believes that the question presented here is substantial and requires plenary consideration and warrants briefs on the merits and oral argument for resolution of the question. The reason the question is substantial is set out below.

The Arkansas Supreme Court, among other things, held in this case that the delay was reasonable and consistent with the constitutional standards set out in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972), and refused to dismiss the case on speedy trial grounds.

However, petitioner disagrees with this opinion of the Arkansas Supreme Court and asserts that her speedy trial right was violated by the trial court and that this opinion of the Arkansas Supreme Court raises a substantial federal question concerning speedy trial rights. The reason a substantial federal question is involved is because the United States Supreme Court has totally refused to set any time limit that a person can be held under the threat of trial. This refusal of the Supreme Court has resulted in a consistent and creeping increase in the time that states such as Arkansas can hold a defendant under the threat of trial. That very thing occurred in this case where a change in the speedy trial rule in Arkansas caused this petitioner to be under the threat of trial for an additional 150 days. This is calculated on the basis of three terms of court of 4 months each in Sebastian County, which was increased to 18 months. See *Ark. Stat. Ann.* §22-310, which provides that the terms of court for the Fort Smith District of Sebastian County Circuit Court begin the first Monday in October, first Monday in February, and the first Monday

in June. Also see, *Holland v. State*, 252 Ark. 730, 480 S.W.2d 597 (1972), which provides that the speedy trial rule applies from the date of arrest. (Further, in counting the three terms, the term in which the defendant is arrested is not counted.) With these reasons that this is a substantial federal question in mind, a discussion of the law that applies to this question will be set out below.

The Sixth Amendment to the United States Constitution as made applicable to the States through the Fourteenth Amendment to the United States Constitution guarantees a defendant a speedy trial. See *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967); *Smith v. Hooey*, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed. 2d 607 (1969); and *Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed. 2d 26 (1970).

Article II, §10 of the Arkansas Constitution provides a state constitutional right to a defendant to a speedy trial. See *Maxwell v. State*, 216 Ark. 393, 225 S.W.2d 687, wherein the Arkansas Supreme Court stated that the fundamental purpose of this section was to expedite adjudication so that none could fairly say that the right to acquittal was stifled because those charged with official duty preferred to procrastinate.

Ark. Stat. Ann. §§43-1708 and 1709 were the implementing statutes for speedy trial in Arkansas. Section 43-1708 governed the case where a defendant was held in jail and Section 43-1709 governed the case where, as here, a defendant was on bail and it provided that a defendant had to be brought to trial within three terms of court. *Ark. Stat. Ann.* §22-310 sets three terms of court each year for the Sebastian County Circuit Court, Fort Smith District.

The Arkansas Supreme Court held in *Gardner v. State*, 252 Ark. 828, 481 S.W.2d 342 that Sections 43-1708 and 1709 fixed the very outer limits of what constitutes a speedy trial in Arkansas. These outer limits were three terms of court in a case such as the case at bar.

Act 470 of the 1971 Arkansas General Assembly empowered the Arkansas Supreme Court to promulgate rules of criminal procedure. Pursuant to this Act the Arkansas Supreme Court adopted and approved the proposed Rules of Criminal Procedure, as amended, effective January 1, 1976. (See comments to Rule 1.1 of the Arkansas Rules of Criminal Procedure.) One of these rules was Rule 28.1(b) which also set the limits for a speedy trial at three terms of court when a defendant was at liberty on bail. So, under *Gardner*, supra, this rule was impliedly constitutional. But, on July 1, 1980, the Arkansas Supreme Court amended this rule by entering a per curiam order on June 30, 1980, to be effective July 1, 1980. Amended Arkansas Rule of Criminal Procedure 28.1(c) set the speedy trial time at eighteen months instead of three terms of court and extended the time in the case at bar after the offense was committed (June 3, 1980) but, before the arrest (August 28, 1980).

Rule 28, 1(c), in the present case, goes beyond these outer limits discussed in *Gardner*, supra. Here, it extends petitioner's speedy trial time another 150 days (from 3 terms to 18 months) which is more time in itself that is permitted in Federal Court by 18 U.S.C.A. §361.

The delay in this case is an unconstitutional delay in view of the circumstances. In *Smith v. Hooey*, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed. 2d 607 (1969), the United States Supreme Court held that the Sixth Amendment guarantee

of a right to a speedy trial is essential to protect at least three basic demands of criminal justice. These interests are: (1) To prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation, and (3) to limit the possibilities that long delay will impair the ability of the accused to defend himself.

In assessing these interests the United States Supreme Court has approached the problem by accepting a balancing test in which the conduct of both the prosecution and the defendant are weighed. In *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972), this Court set out four factors to be assessed in determining whether an accused has been deprived of his right to a speedy trial. The four factors identified by this court were "length of delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant". See *United States v. Simmons*, 338 F.2d 804 (2d Cir. 1964).

Further, a defendant has no duty to bring himself to trial, *Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed. 2d 26 (1970). The State has this duty as well as the duty of insuring that the trial is consistent with due process. *Barker v. Wingo*, supra. In *Hodges v. United States*, 408 F.2d 543 (8th Cir. 1969), the Court said:

> "The Government, and for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases. The burden for trial promptness is not solely upon the defense. The right to 'a speedy . . . . trial' is constitutionally guaranteed, and, as such, is not to be honored only for the vigilant and the knowledgeable."

In *State ex rel Sanford v. District Court, Thirteenth Judicial District*, 551 P.2d 1005 (Montana 1976), a delay of ten months was held to be too long and the Montana Court applied the balancing test of *Barker v. Wingo*, supra, and stated that courts necessarily had to approach speedy trial cases on an ad hoc basis. The Court said that a delay of ten months from arraignment to trial established a prima facie case of denial of the right of a speedy trial. Also, a delay of over 14 months was held unreasonable in *United States v. Butler*, 426 F.2d 1275 (1st Cir. 1970).

In *Branch v. United States*, 372 A.2d 998 (D.C. Ct. App. 1977), the Court held that a delay of a year or more gives prima facie merit to any claimed speedy trial denial and then, after such a delay, the burden of justifying the delay or showing the lack of any significant prejudice to the accused is on the government. See also *Sanford, supra.*

In *United States v. Rucker*, 150 U.S. App. D.C. 314, 464 F.2d 823, the Court held, "A delay of over one year between arrest and trial raises a Sixth Amendment claim of 'prima facie merit' *Hedgepeth v. United States*, 124 U.S. App. D.C. 291, 364 F.2d 684 (1966), and it places on the government the necessity of justification, the burden of which increases with the length of the delay * * * When the delay approaches a year and a half, as in this case, the government must provide a justification which convincingly outweighs the prejudice which can normally be assumed to have been caused by the delay". The State has offered no justification for the delay nor offered any evidence to show that this delay was reasonable or justified in the present case.

The four factors discussed in *Barker v. Wingo, supra*, balance in Petitioner's favor in the case at bar. (1) The length of the delay is 16 months and is too long. See

Sanford and *Branch*, supra. (2) The reason for the delay. No reason for the 16 month delay was ever given by the State and the Petitioner has not applied for a delay. So, Petitioner has shown prima facie merit and the State has not offered evidence to justify the delay. (3) Defendant's assertion of the right. The defendant asserted the right after three terms of court expired. This factor does not balance one way or the other in favor of the defendant or the State. (4) Prejudice to the defendant. This interest is also present and will be discussed below.

In *Barker v. Wingo*, supra, this Court identified the three interests of the defendant to be protected by a speedy trial:

> "* * * (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."

The case of *State v. Steward*, (Montana) 543 P.2d 178, 32 St. Rep. 1185, contains an excellent discussion of these interests and they apply to the case at bar. This discussion is set out below.

The first interest of Steward was not affected by a lack of a speedy trial as he was released on bond within days of his arrest and remained free on bond. (The same applies herein).

The second interest to be protected by a speedy trial may be difficult to prove, as anxiety and concern are not readily subject to objective evidence. The United States Supreme Court, on at least two occasions stated that, although the defendant is free on bond:

(1) "* * * The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." (*Klopfer v. North Carolina*, 386 U.S. 213, 222, 87 S.Ct. 988, 993, 18 L.Ed. 2d 1, 7.)

(2) "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." (*United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed. 2d 468, 478; cited by Mr. Justice White in his concurring opinion in *Barker*.)

See also, *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed. 2d 183 where this court held that an accused is not required to affirmatively establish prejudice where there has been an excessive delay.

Steward went on to say that the record was bare of facts on anxiety and concern caused defendant but it is manifest that a number of interferences with defendant's liberty set forth in *Klopfer* and *Marion* had occurred to Steward. Given the nature of the charges, public and private feelings against Steward would be expected. The same principles apply in the case at bar.

In *Steward* the Court said it was difficult to determine whether he would be prejudiced due to impairment of his defense as there had been no trial or witness testimony which might indicate a loss of memory regarding events of the distant past. The court also said the prosecution might also have its case impaired due to the loss of memory

of its witnesses, but the greater danger of prejudice exists for an innocent defendant who might, through lapse of time, be unable to accurately recall events on a certain day when there was no remarkable or memorable occurrence to etch the memory of the day in his mind. (This is especially true in the case at bar where the offense occurs in June and the arrest is not made until August.)

Steward was dismissed because of these interests of the defendant. These same interests are present here and petitioner's speedy trial right has been violated.

This Court, when considering the totality of the circumstances and considering the balancing test, it should appear that there has been an excessive delay, no valid reason exists for the delay, the delay is not chargeable to petitioner and some prejudice has resulted to petitioner by reason of the delay.

The above clearly reflects that a substantial federal question concerning speedy trial rights is present in this case. This court should look at this case and see if the States, especially Arkansas, are slowly eroding away defendants speedy trial rights by increasing the time a case can be delayed and stop this practice of excessive trial delays. It is important that this case be accepted for decision because an important federal question of violation of Sixth Amendment rights of a petitioner in this type of situation is present and urgently calls for resolution.

CONCLUSION

Petitioner submits that for the above reasons the petition for Writ of Certiorari should be granted and the case accepted for decision.

Respectfully submitted,

ROBERT S. BLATT
Attorney at Law
P.O. Box 1825
Fort Smith, Arkansas 72902
(501) 785-0123

Attorney for Petitioner

Appendix "A"

IN THE SUPREME COURT OF ARKANSAS

TISH JENNINGS

vs.

STATE OF ARKANSAS

NO. CR-82-23

Opinion Delivered May 24, 1982

ROBERT H. DUDLEY, *Associate Justice*

Petitioner seeks to prohibit David Partain, Judge, from holding a trial on charges pending against her. She contends that she has not been afforded a speedy trial. On August 28, 1980, petitioner was arrested and charged with having committed a felony on June 3, 1980. She has remained lawfully at liberty on bond since her arrest. The trial judge set her trial for December 17, 1981, which was within 18 months of the date of her arrest. Prior to the trial she moved for dismissal for lack of speedy trial. Her motion was denied by the trial court. She now seeks a writ of prohibition in this court. We decline to issue the writ.

Petitioner contends that under Ark. Stat. Ann. §43-1709 (Repl. 1977), she was entitled to be tried within three terms of court and that three terms have passed without trial. The statute cited by petitioner has been superseded by A.R.Cr.P. Article VIII, Speedy Trial, Vol. 4A (Repl. 1977 and Supp. 1981). *Matthews v. State*, 268 Ark. 484, 598 S.W. 2d 58 (1980).

Petitioner takes cognizance of the *Matthews* decision, supra, but contends that the superseded three-term statute

and the 18-month speedy trial rule, A.R.Cr.P. 28.1(c) (Supp. 1981) are inconsistent. She argues that, as a result of the inconsistency, Ark. Stat. Ann. §22-242 (Supp. 1981), which authorized this court to prescribe rules of criminal procedure, is an unlawful delegation of legislative authority. In *Miller v. State*, 262 Ark. 223, 555 S.W.2d 563 (1977), we addressed this issue and held this not to be an unlawful delegation of legislative authority. We noted the enabling act "merely recognizes and is harmonious with the court's inherent powers rather than conferring an express power." Certainly, if we have the inherent power to make the Rules of Criminal Procedure, it follows that we have the inherent power to amend those rules.

Petitioner next contends that the crime occurred on June 3, 1980, and that our speedy trial rule in effect at that time must govern. The rule in effect on June 3, 1980, provided for a trial within three terms, A.R.Cr.P. 28.1(c) (Repl. 1977), while the rule in effect at the time of trial, A.R.Cr.P. 28.1(c) (Supp. 1981), provides for a trial within 18 months. If speedy trial rules were substantive law the petitioner would be correct for a trial is controlled by the substantive law in effect on the date of the commission of the crime. Art. 2, §17, Constitution of Arkansas; *Taylor v. Governor*, 1 Ark. 21 (1837). However, speedy trial rules are not substantive law, they are procedural law. As stated in *Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981):

> Alternatively, Cassell argues in this court that our former statute requiring an incarcerated defendant to be tried within two terms of court laid down a rule of substantive law which this court could not supersede by a rule of procedure permitting a longer delay. Ark. Stat. Ann. §43-

> 1708 (Repl. 1977). That statute, however, was not substantive law merely because its violation might have a substantive effect. That is true of many procedural statutes, such as a statute of limitations or a statute requiring a defendant to file an answer within 20 days after the service of summons. In criminal matters substantive law declares what acts are crimes and prescribes the punishment; procedural law provides or regulates the steps by which one who violates a criminal statute is punished. *Roberts v. Love*, 231 Ark. 886, 333 S.W.2d 897 (1960). Under that distinction a speedy trial statute is procedural.

Because the rule is procedural it can be validly applied to all criminal trials commencing on or after July 1, 1980.

Petitioner next contends A.R.Cr.P. 28.1(c) (Supp. 1981) is unconstitutional because it violates the right to a speedy trial as provided in both the Sixth Amendment of the United States Constitution and Article II, §10 of the Arkansas Constitution. Petitioner cites no federal or state case for the proposition that an 18-month speedy trial rule for one at liberty on bond is prejudicial. The 18-month period is reasonable and is consistent with the constitutional standards set out in *Baker v. Wingo*, 407 U.S. 514 (1972).

Petition denied.

Appendix "B"

IN THE SUPREME COURT OF ARKANSAS

TISH JENNINGS

vs.

STATE OF ARKANSAS

NO. CR-82-23

NOTICE FOR FILING FOR WRIT OF CERTIORARI TO REVIEW

FILED JUNE 8, 1982

Comes the Appellant-Petitioner, Tish Jennings, and hereby gives notice of filing for Writ of Certiorari to review the final decision and opinion delivered on May 24, 1982, by the Arkansas Supreme Court affirming the Judgment of the Sebastian County Circuit Court, dated January 19, 1982, and designates the entire judgment, opinion and decision of the Arkansas Supreme Court to be reviewed by Certiorari.

The review by Certiorari is taken to the United States Supreme Court under provisions of 28 U.S.C. Section 1257(3).

/s/ Robert S. Blatt
Attorney at Law
P.O. Box 1825
Fort Smith, AR 72902

Attorney for Appellant/ Petitioner